No. 87-776

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANSPORTATION COMMUNICATIONS UNION,
Petitioner,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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On December 1, 1987, this Court decided *United Paperworkers v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987), in which it reversed a judgment setting aside an arbitration award on the grounds that it violated public policy. In its unanimous opinion the Court articulated several principles that are directly relevant to the question presented by this petition.

A. Central to the Court's analysis and holding was the principle that judicial review of labor arbitration awards is " 'very limited' ". 56 U.S.L.W. at 4013 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960)). Justice White emphasized that the *Steelworkers* trilogy "made clear almost 30 years ago" that "the courts play only a limited role when

asked to review the decision of an arbitrator." 56 U.S.L.W. at 4013. Courts, he wrote, lack authority "to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.* The federal labor policy " 'would be undermined if courts had the final say on the merits of the awards.' " *Id.* (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)). *Misco* accordingly reaffirmed the very limited role of the reviewing court in connection with each of the arbitrator's tasks: factfinding, contract interpretation, and the formulation of remedies. *See* 56 U.S.L.W. at 4014. With respect to contract interpretation—at the heart of the question presented by this petition—*Misco* held that the function of the reviewing court " 'is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.' " 56 U.S.L.W. at 4013 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568).

Misco also reiterated the rationale for very limited judicial review: national labor policy—embodied in statutory law—consigns the resolution of contract interpretation questions to the expert, relatively speedy, and inexpensive process of arbitration. This policy would be defeated by intrusive review. *See* 56 U.S.L.W. at 4014. The Court also explained that "grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established." *Id.* For all of these reasons, the Court unanimously held in *Misco* that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

B. As noted above, *Misco* reaffirmed the importance of the teachings of the *Steelworkers* trilogy of 1960. As petitioner has explained, Pet. at 16-18, the Court has yet to provide similarly specific guidance regarding the precise meaning of the jurisdictional provision of the Railway Labor Act, 45 U.S.C. § 153, First (q), enacted in 1966. In *Union Pacific Railroad v. Sheehan* the Court held that section 3, First (q) "means just what it says." 439 U.S. 89, 93 (1978) (per curiam). This case affords the Court a much-needed opportunity definitively to establish what Congress meant when it somewhat opaquely said in section 3, First(q) that a court may set aside an order of the Adjustment Board "for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction." 45 U.S.C. § 153, First(q).[1]

Although the arbitration award at issue in *Misco* was rendered pursuant to a collective bargaining agreement, there is every reason to believe that the axioms of "very limited" judicial review of arbitration awards articulated in *Misco* apply fully to judicial review of arbitration awards under the Railway Labor Act. According to the legislative history, sections 3, First(p) and (q) were intended to limit review of Adjustment Board awards "to those grounds commonly provided for review of arbitration awards." S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966). *See* Pet. at 16.[2] Moreover, the Court's reasons for limiting judicial review of arbitration awards rendered pursuant to private, consensual agreements should apply with equal or greater force where—as under the Railway Labor Act—arbitration is conducted

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[1] Notwithstanding respondent's assertion to the contrary, *see* Op. Cert. at 21, and despite the uncertainty of some of the lower courts as to its meaning, *see* Pet. at 17-18, the Court has never construed this statutory language.

[2] Respondent agrees with this analysis of the legislative history. *See* Op. Cert. at 22-23.

pursuant to a Congressional mandate embodying the national labor policy in the transportation industry. *See* Pet. at 15-16.

C. There is also good reason to believe that the courts below would have decided this case differently if they had decided it after *Misco*. The court of appeals affirmed the judgment setting aside the Adjustment Board's awards because of the Board's failure to discuss "either the Scope Rule provisions at issue here, or their applicability to the instant case." Pet. App. at 9a. Yet *Misco* states that the courts " 'have no business . . . determining whether there is particular language in the written instrument which will support the claim.' " 56 U.S.L.W. at 4014 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568). The district court was obviously influenced by its view that the remedy formulated by the Adjustment Board was inappropriate. *See* Pet. at 6, 7 n.9. *Misco*, by contrast, clearly holds that the arbitrator " 'is to bring his informed judgment to bear in order to reach a fair solution of the problem. *This is especially true when it comes to formulating remedies.*' " 56 U.S.L.W. at 4015 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597) (emphasis in the original).

For the foregoing reasons, and for the reasons set forth in the petition, the petition for certiorari should be granted. If the Court decides not to grant the petition, however, petitioner respectfully requests that it vacate the judgment of the court of appeals and remand this case for reconsideration in light of the principles recently articulated in *Misco*.[3]

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[3] *Cf. United Paperworkers v. S.D. Warren Co.*, No. 87-583 (U.S. Dec. 14, 1987) (vacating and remanding for reconsideration in light of *Misco* the judgment of the court of appeals setting aside an arbitration award as violative of public policy).

Respectfully submitted,

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